

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

a bilateral wrist condition as a consequence of the accepted April 3, 2007 employment injury.<sup>2</sup> As the Board noted, OWCP had accepted that she sustained contusions to the chest wall, left shoulder and upper arms, as well as sprains to the lumbar spine, left shoulder and upper arms when she was struck by a forklift. Appellant stopped working on August 31, 2009 and began receiving compensation for wage loss. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

OWCP had referred appellant, as the Board noted in the prior appeal, for a second opinion evaluation by Dr. Ramon Jimenez, a Board-certified orthopedic surgeon. In an April 23, 2010 report, Dr. Jimenez provided a history and results on examination. He diagnosed cervical and lumbar sprains and shoulder tendinitis, stating that appellant continued to have employment-related residuals. Dr. Jimenez provided a work capacity evaluation (OWCP-5c) indicating that appellant could work eight hours per day, with limitations of four hours of sitting, standing, walking and reaching, with no reaching above shoulder. The limitations also included lifting of 10 pounds for up to two hours per day.

In a report dated September 8, 2011, attending physician Dr. Robert Harrison, a Board-certified internist, noted that appellant had begun vocational rehabilitation in early 2011. He indicated that she did repetitive keying tasks and her neck and hand pain worsened. Dr. Harrison reported that appellant had been restricted to two hours of typing or keying since April 2011.

A rehabilitation counselor completed a job classification form (OWCP-66) dated September 26, 2011 for the position of appointment clerk.<sup>3</sup> The job was described as sedentary strength level, with occasional lifting of 10 pounds, with frequent reaching and handling. The weekly wages were reported as \$400.00, and the counselor indicated that the position was reasonably available in appellant's commuting area, based on a recent labor market survey.

By letter dated October 20, 2011, OWCP advised appellant that her claim had been accepted for cervical strain. In a letter dated October 24, 2011, it advised her that it proposed to reduce her compensation on the grounds that she had the capacity to earn wages as an appointment clerk. OWCP stated that the job was within the work restrictions provided by Dr. Jimenez.

In a letter dated November 17, 2011, appellant's representative stated that appellant disagreed with the proposed action. The representative indicated that appellant had not been able to secure a similar job.

By decision dated December 1, 2011, OWCP reduced appellant's compensation for wage loss. The wage-earning capacity worksheet found that appellant's current pay rate for the date-of-injury position was \$1,072.25 per week and appellant had the capacity to earn \$400.00 per week in the position of appointment clerk.

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<sup>2</sup> Docket No. 12-867 (issued October 4, 2012).

<sup>3</sup> Department of Labor's *Dictionary of Occupational Titles* No. 237.367.010.

Appellant requested a hearing before an OWCP hearing representative, which was held on March 8, 2012. In a report dated February 25, 2012, Dr. George Karalis, a psychiatrist, stated that he was treating appellant for a work-related psychiatric condition.<sup>4</sup> He indicated that the orthopedic injuries had produced psychological sequelae that had worsened her preexisting psychiatric condition. Dr. Karalis reported that appellant wanted to work at the employing establishment.

By decision dated May 8, 2012, the hearing representative affirmed the December 1, 2011 decision. He stated that he found no medical reports in disagreement with the restrictions outlined by Dr. Jimenez.

### **LEGAL PRECEDENT**

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.<sup>5</sup>

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.<sup>6</sup> If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>7</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.<sup>8</sup> Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>9</sup>

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<sup>4</sup> Dr. Karalis identified a separate OWCP claim for a 1993 injury.

<sup>5</sup> *Carla Letcher*, 46 ECAB 452 (1995).

<sup>6</sup> 5 U.S.C. § 8115(a).

<sup>7</sup> *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

<sup>8</sup> *See Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>9</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

## ANALYSIS

In the present case, OWCP found that the position of appointment clerk, No. 237.367-010 in the Department of Labor's *Dictionary of Occupational Titles*, represented appellant's wage-earning capacity. To be an appropriate position for a wage-earning capacity determination under 5 U.S.C. § 8115(a), the position must be medically and vocationally suitable. The evidence must also properly document the position's availability and the wages earned and OWCP must follow established procedures before reducing appellant's wage-loss compensation.

With respect to the issue of medical suitability of the selected position, OWCP primarily refers to the reports of Dr. Jimenez, the second opinion physician. As to the work restrictions reported, Dr. Jimenez limited appellant to, *inter alia*, four hours of sitting and reaching and no overhead reaching. OWCP does not explain how it determined that these restrictions were within the job requirements of the appointment clerk position. There is nothing in the job classification form (OWCP-66) that limits sitting to no more than four hours. The position is specifically described as a sedentary position. In addition, the job required frequent reaching, and Dr. Jimenez had limited appellant's reaching to four hours. The form states that frequent means up to two thirds of the time may be spent on the activity. It is not clear whether any of the reaching required was above shoulder.

There are additional questions raised by the medical evidence. Dr. Harrison did not specifically address the performance of the selected position, but did limit appellant's keying activities to no more than two hours per day. It is not entirely clear whether such a restriction would be within the job requirements of the selected position. It is also not clear whether such restrictions derived from an employment-related or preexisting condition, or whether it was based on a subsequently acquired condition.<sup>10</sup> The record also indicates that appellant had another claim involving an emotional condition, and OWCP does not make clear findings as to any accepted conditions or relevant medical evidence with respect to that claim. The hearing representative finds that Dr. Karalis did not preclude appellant from performing the position of appointment clerk. However, it is not appellant's burden to submit evidence showing she could not perform the position. Rather, it is the burden of OWCP to establish that the selected position was medically suitable.

OWCP procedures state that, unless the medical evidence is "clear and unequivocal" that the selected position is medically suitable, OWCP should send a job description to an appropriate physician for an opinion as to whether the claimant can perform the position.<sup>11</sup> The medical evidence in this case is not "clear and unequivocal" as to whether the position of appointment clerk was medically suitable. OWCP should have secured a rationalized medical opinion on the issue. The Board accordingly finds that OWCP did not meet its burden of proof to reduce compensation pursuant to 5 U.S.C. § 8115(a).

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<sup>10</sup> OWCP must consider employment-related and preexisting conditions in determining medical suitability of a position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (October 2009).

<sup>11</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP did not properly determine that the selected position of appointment clerk represented appellant's wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 8, 2012 is reversed.

Issued: May 7, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board